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No. 94-1321

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARLEY-DAVIDSON, INC.,
Petitioner,

v.

MINSTAR, INC., and AMF INCORPORATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF AFFILIATED CORPORATIONS

Pursuant to Supreme Court Rule 29.1, following is a list of the parent corporations and non-wholly owned subsidiaries of each respondent:

Minstar, Inc.: Genmar Holdings, Inc., is the parent corporation of Minstar, Inc. Minstar, Inc., has no non-wholly owned subsidiaries.

AMF Incorporated: Minstar, Inc. is the parent corporation of AMF Incorporated. AMF Incorporated has no non-wholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Minstar, Inc. ("Minstar"), and AMF Incorporated ("AMF") respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioner Harley-Davidson, Inc. ("Harley-Davidson"), seeking review of the Seventh Circuit's opinion in this case. That opinion by Chief Judge Posner is reported at 41 F.3d 341 (1994) and can also be found at pages A-1 through A-6 of the Appendix to Harley-Davidson's Petition.

COUNTERSTATEMENT OF THE CASE

Harley-Davidson's statement of the case does not contain any material inaccuracies regarding the background of the primary legal issue in this action—whether Section

107(e) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(e), precludes contractual allocations or indemnifications among potentially responsible parties ("PRPs") regarding the costs of CERCLA liability. With respect to a secondary argument raised by Harley-Davidson concerning the specific contractual arrangements between Harley-Davidson and AMF, however, Harley-Davidson's statement of the case is materially inaccurate and incomplete.

Harley-Davidson asserts that "AMF sold the York Facility to Harley-Davidson, via [the 1981] Purchase Agreement." (Pet. p. 9). In fact, under the 1981 Purchase Agreement AMF sold, *inter alia*, all of the *stock* of two subsidiaries, one of which owned the York Facility, to Harley-Davidson's corporate predecessor. The predecessor subsequently merged with the former AMF subsidiaries to become what is now Harley-Davidson. In addition, Harley-Davidson fails to mention that AMF's obligations under the indemnification provision contained in Section 10.5(a)(ii)(I) of the 1981 Purchase Agreement described by Harley-Davidson (Pet. pp. 9-10) were subject, along with certain other indemnification provisions, to an aggregate cap of $7,000,000.

Most significantly, Harley-Davidson neglects to mention that, on March 23, 1990, it sued Minstar in Wisconsin state court seeking to recover, under Section 10.5(a)(ii)(I) and other provisions of the 1981 Purchase Agreement, its cleanup costs relating to the York Facility—the same costs that Harley-Davidson now asserts cannot be allocated by private agreement under Section 107(e) of CERCLA. *Harley-Davidson, Inc. v. Minstar, Inc.*, No. 90-CV004063 (Milwaukee Cir. Ct., Wis.) (hereinafter the "State Court Action"). On March 14, 1991, Minstar and Harley-Davidson executed a Settlement Agreement resolving the State Court Action, under which Minstar paid $1.9 million toward the cleanup of the York Facility, and also agreed to pay the lesser of $125,000 or 60% of project

costs for each successive calendar quarter, up to the lesser of $4 million or 60% of project costs. Under the Settlement Agreement, these payments fully satisfied and exhausted AMF's obligations under the relevant indemnity provisions of the 1981 Purchase Agreement.

REASONS WHY THE PETITION SHOULD BE DENIED

The focus of Harley-Davidson's Petition is its claim that the Seventh Circuit—and the seven other circuit courts that have addressed this issue—erred in concluding that Section 107(e) of CERCLA does not bar the enforcement of indemnification agreements between PRPs. (Pet. pp. 21-34). The unanimous view of the circuit courts is the correct one, however, and review by this Court manifestly is not warranted. Harley-Davidson's second argument is that Chief Judge Posner's opinion below conflicts with a prior Seventh Circuit decision. (Pet. pp. 34-40). Not only is this untrue, it is a matter for the Seventh Circuit (which thought so little of Harley-Davidson's claim that it denied Harley-Davidson's request for rehearing *en banc*), not this Court. Finally, Harley-Davidson incorrectly claims that the Seventh Circuit erred in interpreting and applying the contractual provisions at issue, a subject that certainly is not of any general significance and thus is not appropriate for consideration by this Court. Accordingly, this Court should deny Harley-Davidson's Petition.

I. EIGHT CIRCUIT COURTS HAVE UNANIMOUSLY AND CORRECTLY CONCLUDED THAT SECTION 107(e) OF CERCLA DOES NOT BAR ENFORCEMENT OF PRIVATE INDEMNIFICATION AGREEMENTS AMONG PRPs.

The issue of whether Section 107(e) bars enforcement of private indemnification agreements among PRPs has now been addressed by eight different circuit courts—the First, Second, Third, Fifth, Sixth, Seventh, Ninth and Tenth Circuits—and those courts have unanimously concluded that Section 107(e) presents no such bar. *Harley-*

Davidson, Inc. v. Minstar, Inc., 41 F.3d 341, 342 (7th Cir. 1994); *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750, 755 (5th Cir. 1994); *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 112-13 (3d Cir. 1994); *Town of Munster, Ind. v. Sherwin Williams Co., Inc.*, 27 F.3d 1268, 1272 (7th Cir. 1994); *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 211 (3d Cir. 1994); *Keywell Corp. v. Weinstein*, 33 F.3d 159, 165 (2d Cir. 1994); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir.), *cert. denied sub nom. Advance Chemical Co. v. United States*, 114 S. Ct. 300 (1993); *AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 994-95 (6th Cir. 1993); *Commander Oil Corp. v. Advance Food Service Equip.*, 991 F.2d 49, 51 (2d Cir. 1993); *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1300-01 (6th Cir. 1992); *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 600, 692 (9th Cir. 1992); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986).[1] Section 107(e) reads, in its entirety, as follows:

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[1] Additionally, while the few district courts that have endorsed Harley Davidson's position have all been overruled, either directly or indirectly, there are numerous reported district court decisions that have reached the same conclusion as the Seventh Circuit. *See, e.g., Kaufman and Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468 (N.D. Cal. 1993); *Armotek Indus., Inc. v. Freedman*, 790 F. Supp. 383 (D. Conn. 1992); *Fox River Grove, Ill. v. Grayhill, Inc.*, 806 F. Supp. 785 (N.D. Ill. 1992); *Robertshaw Controls Co. v. Watts Regulator Co.*, 807 F. Supp. 144 (D. Me. 1992); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309 (D.N.J. 1992); *Bowen Eng'g v. Reeve*, 799 F. Supp. 467 (D.N.J. 1992), *aff'd mem.*, 993 F.2d 223 (3d Cir. 1993), *aff'd mem.*, 19 F.3d 642 (3d Cir. 1994); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D.N.J. 1991); *In re Hemingway Transp., Inc.*, 126 Bankr. 650 (D. Mass. 1991); *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448 (N.D. Ind. 1990); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp.

> (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to *transfer* from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person *the liability imposed* under this section. *Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.*
>
> (2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

42 U.S.C. § 9607(e) (emphasis supplied).

Though Section 107(e) may not be a model of statutory draftsmanship, it has not created any problem of appellate interpretation. The reason for this is plain. As Chief Judge Posner explained:

> The subsection taken as a whole is notably obscure, but we agree with every other appellate court that has been called on to interpret it that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability. *E.g., John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993). The first sentence speaks of 'transfer[ring] . . . liability,' that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified party remains fully liable to whomever he has wronged; he

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1563 (E.D. Pa. 1988); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987); *Chemical Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285 (E.D. Pa. 1987); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1986), *aff'd in part and vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

> just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting.

(Pet. App. pp. A-2 - A-3).

In its Petition, Harley-Davidson asserts that "the *majority* of these [circuit] courts have not undertaken a careful and well-reasoned analysis of the statute." (Pet. p. 26 (emphasis supplied)). Even if this were true—which it is not—Chief Judge Posner's opinion manifestly constitutes a "careful and well-reasoned analysis." Chief Judge Posner first analyzes Section 107(e)'s express language, then goes on to discuss both the legislative history of Section 107(e) and the policy ramifications of the Seventh Circuit's interpretation. (Pet. App. pp. A-2 - A-5). Equally "careful and well-reasoned analyses" are found in the decisions of other circuit courts. *See, e.g., Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 210-11 (3rd Cir. 1994) (discussing the express language of Section 107 (e)(1) and the relationship between the first and second sentences of that provision); *AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 993-95 (6th Cir. 1993) (discussing in detail the express language, legislative history and public policy of Section 107(e)). The fact that some circuit courts may have addressed this issue in a more perfunctory fashion than others is not a basis for review by this Court. Once an issue has become well settled, there is no reason for each successive court to provide a detailed repetition of prior analyses.

Harley-Davidson also argues that its Petition should be granted because the numerous circuit and district courts that have rejected the interpretation advanced by Harley-Davidson have "utilized different methods of interpreting the statutory language." (Pet. p. 29). To begin with, an even cursory review of the cases reveals that Harley-Davidson greatly overstates the inconsequential variations in analyses among the many courts that have addressed this issue. Moreover, inasmuch as dozens of courts have

been addressing these issues virtually simultaneously (based on the no doubt diverse arguments of the parties appearing before them), lack of perfect uniformity in approach is hardly unusual and is certainly immaterial.[2]

The important point here is that the judgment of the Seventh Circuit is consistent with the judgments of the seven other circuit courts that have addressed this issue. Chief Judge Posner correctly concluded that Section 107(e) does not bar indemnification agreements among PRPs. Review by this Court is unwarranted, and Harley-Davidson's Petition should be denied.

II. THERE IS NO CONFLICT WITHIN THE SEVENTH CIRCUIT, AND EVEN IF THERE WERE SUCH A CONFLICT, CERTIORARI WOULD BE INAPPROPRIATE.

Harley-Davidson also asserts—incorrectly—that Chief Judge Posner's opinion is in conflict with *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994), and that this Court should grant certiorari to resolve this purported conflict. (Pet. pp. 34-40). First, intra-circuit conflicts should be addressed by the circuit court itself. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974). The Seventh Circuit had an opportunity to rehear this case *en banc*, and its decision not to do so does not merit review by this Court.

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[2] Harley-Davidson also argues that this Court should grant certiorari to provide "guidance" regarding the meaning of Section 107(e) to the multitude of private parties that have entered into indemnification agreements with respect to the costs associated with CERCLA liabilities. (Pet. pp. 6-7, 21-23). What Harley-Davidson is really asking, of course, is that this Court issue an opinion which would void these agreements—which would have enormous repercussions for the parties to these agreements—so that indemnitors such as Harley-Davidson would be relieved of the contractual obligations they have undertaken. As Chief Judge Posner properly held, however, there is no legal basis whatsoever for Harley-Davidson's position.

Second, there is no conflict between Chief Judge Posner's opinion and the *Kerr-McGee* case. In *Kerr-McGee*, the Seventh Circuit held (without discussing Section 107(e)) that the defendant, Lefton, was required to honor its contractual indemnity obligation to the plaintiff, Kerr-McGee, and to pay the costs of the cleanup at issue. *Kerr-McGee*, 14 F.3d at 327. Harley-Davidson ignores this holding and instead focuses on Kerr-McGee's alternative claim for an equitable allocation of cleanup costs pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613. Although the Seventh Circuit did, indeed, discuss the equitable factors inherent in a Section 113 allocation, it then concluded, "[h]owever, since we hold below that Lefton must indemnify Kerr-McGee for its clean up costs it does not appear that a reallocation of contribution will be necessary on remand." *Kerr-McGee*, 14 F.3d at 326. Thus, there is no conflict between Chief Judge Posner's opinion and the *Kerr-McGee* decision, both of which conclude that indemnity agreements among PRPs are enforceable.

III. THE PROPER INTERPRETATION OF THE DOCUMENTS HERE AT ISSUE DOES NOT PRESENT A QUESTION OF GENERAL IMPORTANCE.

Finally, Harley-Davidson argues that this Court should correct Chief Judge Posner's alleged errors in (1) ignoring the purported significance of the 1981 Purchase Agreement, and (2) misapplying state law in interpreting the 1980 Acquisition Agreement. These arguments are limited to the facts of this case and will affect a grand total of three parties—Harley-Davidson, AMF and Minstar—and therefore are inappropriate for review by this Court.

Moreover, Chief Judge Posner's analysis is absolutely correct. As to Harley-Davidson's first argument, Harley-Davidson ignores two crucial facts: (1) the 1981 Purchase Agreement was a stock sale, thus Harley-Davidson,

the successor by merger to the two former AMF subsidiaries whose stock was sold, *automatically* succeeded to all of the liabilities of these corporations (including liability relating to the York Facility); and (2) the settlement of Harley-Davidson's State Court Action against Minstar resolved the only relevant indemnity issues under the 1981 Purchase Agreement, thus the effect of the indemnity in the 1980 Acquisition Agreement was all that was left to be resolved. As to Harley-Davidson's second argument, Chief Judge Posner properly found that the indemnity provision in the 1980 Acquisition Agreement "could not be more broadly worded" and that the provision is "enforceable and applicable." (Pet. App. p. A-6).[3]

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[3] Harley-Davidson also suggests that Chief Judge Posner erred in considering these matters at all, because they were not "plainly put forth in the record in as complete a form as is required for final determination of the legal principles involved." (Pet. pp. 46-47). Not only is this untrue, it was *Harley-Davidson itself* that asked the Seventh Circuit to address these matters. (Pet. App. p. A-5). Harley-Davidson cannot now complain that the Seventh Circuit should not have answered the questions Harley-Davidson put to it.

CONCLUSION

Eight circuit courts have unanimously spoken regarding the meaning of Section 107(e), and review by this Court would serve no useful purpose. Harley-Davidson's Petition plainly reveals that Harley-Davidson is no more than a disgruntled litigant seeking one last chance to present its flawed arguments. Minstar and AMF therefore respectfully request that Harley-Davidson's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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